IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1035

JULIA ROGERS,

*Petitioner,*

v.

LEROY LOETHER and MARIANE LOETHER, his wife, and MRS. ANTHONY PEREZ

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 29, 1972.

### Citations to Opinions Below

1. Opinion of district court denying demand for jury trial, May 19, 1970, reported 312 F.Supp. 1008 (1a-6a).
2. District court's unreported findings of fact and conclusions of law, October 27, 1970 (7a-11a).
3. Opinion of Court of Appeals, reported 467 F.2d 1110 (13a-33a).

## Jurisdiction

The court of appeals entered judgment on September 29, 1972 (34a). On December 14, 1972, Mr. Justice Rehnquist extended the time for filing this petition to January 27, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Question Presented

Whether either Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19, or the Seventh Amendment to the United States Constitution, require a trial by jury on the demand of a landlord in an action by a black apartment applicant for injunctive relief and punitive damages to redress a racially discriminatory refusal to rent?

## Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment VII provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to rules of the common law.

2. Section 804(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a) provides:

> As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale

or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

3. Section 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, provides:

(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 810(d) from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of

a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

## Statement of the Case

On November 7, 1969, petitioner Julia Rogers complained in United States District Court for the Eastern District of Wisconsin that Leroy and Mary Loether, white owners of a house in Milwaukee,[1] violated Section 804 of the Civil Rights Act of 1968 by refusing to rent an apartment to Mrs. Rogers because she is black. She requested injunctive relief and $1000 punitive damages, but neither alleged nor sought actual damages. Jurisdiction of the district court was based on Section 812 of the Act. After an evidentiary hearing on November 20, 1969, the court preliminarily enjoined rental of the apartment pending final determination of the action. Defendants answered and demanded a jury trial of issues of fact.

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[1] The complaint also named Mary Loether's cousin, Mrs. Anthony Perez, who resided in the house and was authorized to show the vacant apartment to applicants.

By the time the district court considered and denied the jury demand, two developments intervened. Following the preliminary hearing petitioner found a place to live and disclaimed need for injunctive relief. Also, during pretrial proceedings petitioner indicated an interest in compensatory as well as punitive damages, and the court viewed her claim as including both. The court ruled that Section 812 of the Civil Rights Act of 1968 did not expressly require jury trials and appeared "to treat the actual damages issue as one for the trial judge rather than a jury" (4a). It drew support for this construction from rulings that similar language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), does not require jury determination of back pay awards in employment discrimination cases. On the constitutional issue, the district court held "this cause of action is a statutory one invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had. The action is not one in the nature of a suit at common law, and therefore there is no right to trial by jury on the issue of money damages in the case" (2a).

The court entered a standard pre-trial order requiring petitioner to file "an itemized statement of special damages," and, on July 6, 1970, a second order requiring petitioner to "set forth the actual damages claimed and the evidentiary facts in support of such damages." Petitioner filed no statement itemizing actual damages, and at the October 1970 trial the court sustained defendants' objections to testimony concerning actual damages.[2] As the court framed the damage issue at trial, "it's really narrowed down to punitive damages."[3] At the conclusion of

[2] Trial transcript, October 26, 1970, pp. 17-18.

[3] *Id.* at 5, 7.

the trial,[4] the court found that the Loethers effectively rented the apartment to Mrs. Rogers through intermediaries, but, in violation of the Civil Rights Act of 1968, revoked the rental upon learning that Mrs. Rogers is black (7a-11a). The court granted $250 punitive damages, but denied actual damages, attorney's fees and costs (12a).

The Seventh Circuit reversed, holding that defendants' jury trial demand should have been granted.[5] Although the court posed the question—"whether appellant was entitled to a jury trial in an action for compensatory and punitive damages brought under § 812 of the Civil Rights Act of 1968" (13a)—it did not predicate its decision on the abandonment of petitioner's request for injunctive relief and held that the right to a jury trial may be tested by the relief requested in petitioner's complaint (25a). Nevertheless, the court ignored the fact that the complaint alleged no actual damages. Neither did it consider that the district court confined the damage issue at trial to, and rendered judgment for, punitive damages only. In short, the court of appeals decided the broadest jury question possible under Title VIII of the Civil Rights Act of 1968.

The court's opinion centers on its conclusion that an action to enforce Title VIII of the Civil Rights Act of 1968 is "in the nature of a suit at common law" (21a). Three reasons are offered. First, the decision-making tribunal is a court. In this way the court distinguished *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-

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[4] Trial proceedings were expedited by incorporating evidence at the preliminary hearing into the trial record.

[5] The court of appeals rejected defendants' other contentions. The court ruled that the district court's finding of discrimination was not clearly erroneous (14a). It also concluded that the Act authorizes an award of punitive damages even in the absence of actual damages (15a).

49, limiting its principle to administrative agencies. Second, money damages are sought. The court read *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, to mandate "that once *any* claim for money damages is made, the legal issue—whether defendant breached a duty owed plaintiff for which defendant is liable in damages—must be tried to a jury whether or not there exists an equitable claim to which the damage claim might once have been considered 'incidental'" (27a-28a, emphasis added). Third, the court concluded that "the nature of the substantive right asserted, although not specifically recognized at common law, is analogous to common law rights" (22a). The court drew its principal analogy to the obligation of English innkeepers to rent available lodgings to travelers.

The court's extended constitutional analysis culminates in statutory interpretation. It finds the district court's statutory analysis "persuasive but not compelling" and concludes that the statute "implies, without expressly stating, that a jury's participation is appropriate" when damages are sought (31a). In the end the court views as "controlling" a canon of construction requiring the interpretation of statutes to avoid "grave doubts" of unconstitutionality and concludes that Title VIII of the Civil Rights Act of 1968 itself requires jury trials when damages are claimed (33a).

## REASONS FOR GRANTING THE WRIT

### I.

### Certiorari Should Be Granted to Determine an Issue Fundamental to the Successful Administration of an Important Act of Congress.

Section 801 of the Civil Rights Act of 1968 declares it is national policy to provide "fair housing throughout the United States." 42 U.S.C. § 3601. The statute assigns certain administrative responsibilities to the Secretary of Housing and Urban Development and limited powers to the Attorney General of the United States. Against "the enormity of the task of assuring fair housing . . . the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also 'as private attorney general in vindicating a policy that Congress considered to be of the highest priority.'" *Trafficante* v. *Metropolitan Life Insurance Company*, 41 U.S.L.W. 4071, 4073 (U.S. Dec. 7, 1972). Unfortunately, the decision of the court of appeals diminishes the effectiveness of private enforcement actions and jeopardizes the ability of the Act to contribute much beyond the enunciation of national policy.

Critical decisions made in the early life of a statute may forever affect its usefulness. In the case of Title VIII the mode of trial may be the most important such decision. The mode selected, either as a result of statutory or constitutional interpretation, will determine the cost, efficiency, and credibility of the mechanism entrusted to enforce the important rights declared by Congress. These considerations may not bear on this Court's ultimate judgment on the requirements of the Seventh Amendment, but should

weigh heavily in favor of giving plenary consideration to the statutory and constitutional issues in this case.

Jury trials will add cost and delay to the administration of the statute. The median interval in federal courts from complaint to trial is 10 months in non-jury cases but 14 months in jury cases.[6] To a person needing a home, that additional delay in achieving a basic right may be intolerable. Jury trials are also longer and more costly than court trials. Although the statute authorizes the award of reasonable attorney's fees, many of the volunteer lawyers on whom plaintiffs still depend may be discouraged by the increased complexity and cost of extended jury trials.[7]

We are also concerned with prejudice. Admittedly, if the statute or Constitution require jury trials, the possibility of jury prejudice would be an unavoidable concomitant. Still, this consideration supports certiorari. The bitter legislative struggle to adopt a national fair housing law reflects divisions in our society not instantaneously resolved by the Act's passage. We might wish that jurors would be persuaded to lay aside any question of the correctness of the law they enforce, but it frankly seems illusory to think that unanimity of judgment can be achieved with enough frequency to make a reality of the law. To the extent that means exist to screen prejudice in the voir dire of jurors, the process will be costly to plaintiffs and burdensome to the courts. Furthermore, even the possibility of jury

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[6] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 ANNUAL REPORT OF THE DIRECTOR II-74.

[7] Jury trials are also costly to the United States, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 JUROR UTILIZATION IN UNITED STATES COURTS A1-10, and a factor in the ability of federal courts to dispose cases expeditiously. While these considerations do not affect the interpretation of the Seventh Amendment, the impact of jury trials on court dockets and budgets might properly be considered in determining whether to grant certiorari.

prejudice will seriously affect the Act's credibility to racial minorities. Attempting to buy a house when it means buying a lawsuit as well is difficult enough, but when the judges of fact are drawn from the excluding community the effort will seem impossible to many. Unless minorities believe the law will be fairly administered, it will be a dead letter.

Finally, judicial efficiency warrants review at this time of the jury issue in Title VIII actions. While this is the first appellate decision on the right to juries in actions for damages under Section 812,[8] district courts are facing the issue with increasing frequency.[9] Those that decide incorrectly may be required to re-try cases. Those that follow the opinion below will soon confront myriad questions concerning the allocation of functions between judge and jury. We submit this Court should render early judgment on the threshold question whether juries are required to guide lower federal courts in their administration of this new and important law.

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[8] One appellate court has denied the right to a jury trial in an action by the United States for injunctive relief only pursuant to Section 813 of the Act, 42 U.S.C. § 3613. *United States* v. *Reddoch*, No. 72-1326 (5th Cir., Oct. 4, 1972).

[9] *E.g.*, *Cauley* v. *Smith*, 347 F.Supp. 114 (E.D. Va. 1972) (jury trial denied); *Marr* v. *Rife*, Civ. No. 70-218 (S.D. Ohio, Aug. 31, 1972) (jury trial denied); *Kastner* v. *Brackett*, 326 F.Supp. 1151 (D. Nev. 1971) (jury trial granted).

## II.

**The Statute Provides That Issues of Fact in Actions for Injunctive Relief and Damages Be Tried by Judges Without Juries.**

Only a strained reading of Section 812 of the Civil Rights Act of 1968 would support a conclusion that in an unspecified way Congress fragmented between judge and jury the remedial powers necessary to enforce the fair housing law. Every indication is that Congress assigned to judges alone the task of determining liability and integrating the array of possible remedies—injunctions, actual damages, punitive damages, and attorney's fees—into effective unified judgments which achieve the objectives of the law.

The "court" which enforces the statute is described in terms defining judges not juries. Section 812(a) mandates continuances "if the court believes" that conciliation will be successful. Section 812(b) provides the court may appoint attorneys and authorize actions without fees, costs, or security "in such circumstances as the court may deem just." Finally, Section 812(c) provides:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

The judicial processes involved in "if the court believes," "as the court may deem just," "the court may grant relief,

as it deems appropriate," and "in the opinion of the court" all convey determinations of judges, not juries.[10]

Debates in Congress immediately preceding the Act's adoption are not helpful, but the early history of the Act sheds some light. The origin of Section 812(c) is President Johnson's proposed Civil Rights Act of 1966.[11] Section 406 of the administration bill provided that in actions to enforce the proposed fair housing title:

> (c) The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to $500 punitive damages.
>
> (d) The court shall allow a prevailing plaintiff a reasonable attorney's fee as part of the costs.[12]

Attorney General Katzenbach testified about the right to a jury trial under the administration proposal:

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[10] Lower federal courts consistently rule that similar language in Title VII of the Civil Rights Act of 1964 does not require trial by jury. That act provides "if the court finds" racial discrimination in employment "the court" may order injunctive relief and back pay. 42 U.S.C. § 2000e-5(g) (1970). Legislative history confirms that juries are not required, 110 Cong. Rec. 7255 (1964), and without exception courts deny employer demands for juries. *E.g.*, *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Lowry* v. *Whitaker Cable Corporation*, 348 F.Supp. 202, 209 fn. 3 (W.D. Mo. 1972); *Williams* v. *Travenol Laboratories*, 344 F.Supp. 163 (N.D. Miss. 1972); *Cheatwood* v. *South Central Bell Telephone and Telegraph Co.*, 303 F.Supp. 754 (M.D. Ala. 1969); *Culpepper* v. *Reynolds Metals Co.*, 296 F.Supp. 1232 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970). There is no reason to believe that Congress in assigning civil rights enforcement responsibilities to the courts varied the definition of "the court" from one major enactment to another.

[11] 112 Cong. Rec. 9390 (1966).

[12] S. 3296, § 406, 112 Cong. Rec. 9397 (1966).

> Senator Ervin. Now, I would like to know under the same subsection (c) of section 408 (sic) who determines the amount of damages that are to be awarded if a case is made out under Title IV of the bill.
>
> Attorney General Katzenbach. The court does.
>
> Senator Ervin. That is the judge.
>
> Attorney General Katzenbach. Yes, sir.
>
> Senator Ervin. There is no jury trial.
>
> Attorney General Katzenbach. No, sir.[13]

The Attorney General, on several other occasions, indicated that juries were not intended by explaining that the bill authorized punitive damages "in the court's discretion."[14]

Between the administration's first proposal in 1966 and the enactment of Title VIII in 1968, the Act underwent many changes, primarily in the formulation and abandonment of proposals for administrative enforcement. In the end, Congress elected judicial enforcement in a form essentially similar to the administration's 1966 proposal. Con-

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[13] Hearings on S. 3296 before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 2, at 1178 (1966). In the continuation of this exchange Attorney General Katzenbach modified this answer in cases in which no injunctive relief but *only* damages are sought:

> Senator Ervin. Well, is the administration opposed to or has it forsaken the ancient American love for trial by jury?
>
> Attorney General Katzenbach. No, sir, I assume if there was a suit here that was *purely* for damages that the court would use a jury. *Ibid*, emphasis added.

Petitioner's action cannot be described as an action "purely for damages." It was brought as an action for injunctive relief and damages, and the Court of Appeals acknowledged that the right to a jury is tested by the relief requested in the complaint (25a).

[14] *Id.*, pt. 1, at 84; Hearings on H.R. 14765 Before Subcommittee No. 5 of the House Comm. on the Judiciary, 89th Cong., 2nd Sess., ser. 16, at 1057, 1070 (1966); 112 Cong. Rec. 9399 (1966).

gress deleted specific authority to recover damages for humiliation, mental pain, and suffering, increased the authorized award of punitive damages, and modified the attorney's fees requirement; but, apart from these changes, the present enforcement provision is the one Attorney General Katzenbach described to Congress in 1966. It should be interpreted now as it was interpreted to Congress by its principal spokesman, and consistent with its text not be read to require juries in actions for injunctive relief and damages.

Court trials serve important statutory objectives. Section 814 requires that enforcement actions "be in every way expedited." In fair housing cases, most facts relevant to final judgment are presented at preliminary injunction hearings only days after the filing of complaints. Then, final determinations are expedited by incorporating this evidence into trial records, as was done in this case. If juries are mandated, parties will be required to re-try facts already tried before judges at preliminary injunction hearings. A statutory construction requiring re-trials hardly comports with a command that actions "be in every way expedited." Also, court rather than jury trials serve the Congressional objective of minimizing the cost of litigation. Congress authorized the appointment of attorneys, the commencement of actions without fees, costs, or security, and the award of attorney's fees to prevailing plaintiffs. The increased costs resulting from re-trial of facts would seriously undermine the effort to create an inexpensive judicial remedy. "Due consideration of the structure and purpose of the . . . Act as a whole, as well as the particular provisions of the Act brought in question," [15] confirms that Congress intended issues of fact in Title VIII actions to be determined by judges not juries.

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[15] *Katchen* v. *Landy*, 382 U.S. 323, 328.

## III.

## The Seventh Amendment Does Not Prevent Congress From Enforcing the Fair Housing Law in Federal Courts Without the Intervention of Juries.

The court of appeals relied on a canon that statutes should be construed to avoid "grave doubts" of constitutionality (33a). While this may be proper in clashes between constitutional values and ordinary statutes, this case poses a different problem. Title VIII enforces the Thirteenth and Fourteenth Amendments to the United States Constitution,[16] and the "cherished aims"[17] which underlie these amendments. This Court should not allow the constitutional values expressed in Title VIII to be frustrated by canons of construction. The judgment of Congress that it is appropriate to enforce the Civil War amendments in court rather than jury trials should be set aside only on the squarest holding that the Seventh Amendment requires otherwise. Nothing in that amendment or the decisions of this Court requires any such conclusion.

### a. Actions to Enforce Title VIII Are Not in the Nature of Suits at Common Law.

The Seventh Amendment preserves the right to trial by jury "in suits at common law" to the extent the right was known when the Amendment was adopted.[18] In time, the

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[16] Following *Jones* v. *Mayer*, 392 U.S. 409, federal courts have held that Title VIII is an appropriate exercise of Congressional power under the Thirteenth Amendment. *United States* v. *Hunter*, 459 F.2d 205, 214 (4th Cir. 1972); *United States* v. *Real Estate Development Corporation*, 347 F.Supp. 776, 781 (N.D. Miss. 1972); *United States* v. *Mintzes*, 304 F.Supp. 1305, 1312 (D. Md. 1969); *Brown* v. *State Realty*, 304 F.Supp. 1236, 1240 (N.D. Ga. 1969).

[17] *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 98 (Frankfurter, J., concurring).

[18] *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, 657.

question has evolved to be whether a controversy is "in the nature of a suit at common law." [19] Thus, while the Amendment's application to rights created by statute rather than judicial decision is not precluded,[20] the question remains whether particular statutory rights bear sufficient relation to rights known to the common law in 1791 to fall within the Amendment's limited scope.

The rights created by Title VIII of the Civil Rights Act of 1968 are not remotely related to anything known to the common law in 1791. Although by that time English common law no longer enforced the state of slavery,[21] a slave who continued to work for a master was not entitled to wages.[22] The limited common law rights of blacks in

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[19] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48.

[20] While the Seventh Amendment may apply to some federal statutes, the Seventh Circuit was incorrect in stating that the "principal significance" of the amendment has been in the trial of federal questions (16a-17a). To the contrary, the primary reach of the amendment has always been diversity actions in which ordinary common law disputes are litigated. Indeed, both Massachusetts and New Hampshire in their call for a federal bill of rights focused on civil juries in diversity suits, and proposed that:

> "VIII. In civil actions *between citizens of different states*, every issue of fact, arising in actions at common law, shall be tried by a jury . . . ."

I. J. Eliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 323, 326 (2d ed.) (emphasis added). The framers of the Seventh Amendment also framed the First Judiciary Act, which conferred no general federal question jurisdiction on federal courts. Thus, with only limited exceptions, civil juries in federal courts were confined for an extended period to common law diversity actions. Even today, the number of jury trials in diversity actions far exceeds the number in federal question actions. Administrative Office of the United States Courts, 1972 Annual Report of Director A-23.

[21] *Somerset* v. *Stewart*, 98 Eng. Rep. 499 (K.B. 1772).

[22] *King* v. *Inhabitants of Thames Ditton*, 99 Eng. Rep. 891 (1785); A. Lester & G. Bindman, Race and Law 32 (1972).

England did not extend outside England; slavery was not abolished in English colonies until 1834. More generally, "English judges have never declared that acts of racial discrimination committed [in England] are against public policy." [33] In this country, the Constitution acknowledged slavery[34] and this Court interpreted it to deny citizenship to freed blacks.[35] It required a civil war before "slavery, as a legalized social relation, perished," [36] and the Constitution amended to authorize Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery. . . . " [37] No analogy to the duties of English innkeepers[38] overcomes the fact that Title VIII's origins are not English common law but rather a major constitutional revolution long after the adoption of the Seventh Amendment.[39]

The Seventh Circuit also attributed a common law character to this action because the original tribunal in Title VIII actions is a court, not an administrative agency. It reads this Court's decision in *N.L.R.B.* v. *Jones & Laughlin*, 301 U.S. 1, to require Congress to choose between administrative agencies or juries, without the intermediate pos-

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[33] A. LESTER & G. BINDMAN, *supra* note 22, at 25.

[34] Art. I, § 2, art. IV, § 2.

[35] *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393.

[36] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68.

[37] *Civil Rights Cases*, 109 U.S. 3, 20.

[38] Even among public accommodations the innkeeper's duties had limited scope, and did not include lodging houses, boarding houses, private residential hotels, places of entertainment, and restaurants. A. LESTER & G. BINDMAN, *supra* note 22, at 65.

[39] Compare *Culpepper* v. *Reynolds Metals Company*, 296 F.Supp. at 1241: "The focus of [Title VII] is upon the elimination of discrimination in employment, the freedom from which there was no guarantee at common law."

sibility of court trials. We doubt this Court intended to limit Congressional options in enforcing modern statutes. It is not the forum, but the nature of the claim which determines the constitutional issue. If the Constitution allows the claim to be adjudicated without a jury, then Congress should be permitted latitude in determining how the law should be enforced.

**b. A Court in a Title VIII Action Acts as a Court of Equity With Power to Afford Complete Relief.**

The common element in all fair housing proposals considered by Congress was that any law should be enforced —whether by courts, the Secretary of Housing and Urban Development, or a Fair Housing Board—by orders compelling cessation of racially discriminatory housing practices.[30] Title VIII supplements this with the power to award damages, but the Act's basic authority is the power to order the actual provision of housing on a non-discriminatory basis. Thus, a court enforcing Title VIII may fairly be characterized in historical terms as a court of equity. As such, it has power "to decree complete relief and for that purpose may accord what would otherwise be legal remedies." [31]

The power of the English chancellor to both issue an injunction and decree an account for waste was well established when the Seventh Amendment was adopted.[32] In this country, the acknowledged power of a court of equity

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[30] *Compare* S.3296, the administration's 1966 bill, 112 Cong. Rec. 9396 (1966) and H.R. 14765, as modified and passed by the House, 112 Cong. Rec. 18739 (1966), *with* Senator Mondale's amendment, 114 Cong. Rec. 2270 (1968), and Senator Dirksen's substitute, 114 Cong. Rec. 4570-73 (1968).

[31] *Katchen* v. *Landy*, 382 U.S. at 338.

[32] *Jesus College* v. *Bloom*, 26 Eng. Rep. 953 (Ch. 1745).

in a suit for specific performance to award damages enabled Chief Justice Marshall to observe, "it is . . . well settled that if the jurisdiction attaches, the court [of equity] will go on to do complete justice, although in its progress it may decree on a matter which was cognizable at law." [33] This Court repeatedly sustained the power of equity courts in patent and copyright cases to retain jurisdiction "for the sake of administering an entire remedy and complete justice," [34] and relied on these cases to hold that "[the Seventh Amendment] has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law." [35]

The court of appeals reads *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, and *Ross* v. *Bernhard*, 396 U.S. 531, to negate this historic power of courts of equity. It concludes these cases require jury trials "once any claim for money damages is made" (27a). There are several reasons why the court is wrong.

First, subsequent to *Beacon Theatres* and *Dairy Queen*, this Court has reaffirmed the vitality of equity's power to decree complete relief.[36]

Second, the court confuses claims and remedies. In an ordinary Title VIII action there is only a single claim: an unlawful act of racial discrimination has been committed. Only if the claim is established does a court consider the

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[33] *Cathcart* v. *Robinson*, 30 U.S. (5 Pet.) 264, 276.

[34] *Root* v. *Railway Co.*, 105 U.S. 189, 214; *Clark* v. *Wooster*, 119 U.S. 322, 325.

[35] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. at 48, citing *Clark* v. *Wooster*, *supra*.

[36] *Katchen* v. *Landy*, 382 U.S. at 338.

remedies which may be used "as it deems appropriate." Section 812(c). The court's exercise of discretion is undoubtedly governed by the purpose of the statute,[37] but within it the court has the power to select or group the remedies made available by Congress.[38] Therefore, in no sense do "damages" constitute a separate claim. The "basic character" [39] of a Title VIII action is not determined by the fact that one among several remedies made available by the statute is money damages.

Third, *Beacon Theatres*, *Dairy Queen*, and *Ross* differ markedly from actions to enforce Title VIII. The dispute in *Beacon Theatres* arose under the antitrust laws, which this Court construes to create a statutory right to trial by jury.[40] The basic controversy in *Dairy Queen* involved an alleged breach of contract.[41] The corporation's claim in *Ross* included ordinary breach of contract and negligence.[42] In contrast, under Title VIII there is "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." [43]

Finally, "the rule of Beacon Theatres and Dairy Queen . . . is itself an equitable doctrine . . . ." [44] Equity often decreed complete relief to avoid multiple actions. Yet, jury trials under Title VIII would require re-trial of facts heard

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[37] *Cf. Mitchell* v. *De Mario Jewelry*, 361 U.S. 288, 296.

[38] One example of the interrelationship of possible remedies is *Jones* v. *Mayer* where this Court thought injunctive relief could be fashioned which would obviate any actual damage problem. 392 U.S. at 414 fn. 14.

[39] *Simler* v. *Conner*, 372 U.S. 221, 223.

[40] 359 U.S. at 504.

[41] 369 U.S. at 477.

[42] 396 U.S. at 542.

[43] *Katchen* v. *Landy*, 382 U.S. at 339.

[44] *Ibid.*

expeditiously by district courts at preliminary injunction hearings, a wasteful result which equity does not require.

**c. There Is No Right to a Jury Trial in Respect to the Limited Punitive Damages Remedy Available Under the Statute.**

The court of appeals discussed actual damages hypothetically. The complaint alleged no actual damages, the district court permitted no testimony of actual damages beyond offers of proof, and the judgment included no award for actual damages. It is only punitive damages which the complaint requested and the district court granted.

The case for jury determination of punitive damage awards has even less merit than the case for jury determination of actual damages. At least, when juries are required by statute or common law in actions seeking actual damages there is work for the jury as a fact-finder. The jury must determine whether there are "actual" damages, and must determine whether one party's unlawful behavior is the proximate cause of the other party's injury. There are no equivalent findings to be made in a case involving punitive damages. If this were a common tort action, it might be necessary to find that the defendants acted "maliciously" or "wantonly." But this is an action pursuant to a statute which provides that "the court may award . . . not more than $1000 punitive damages . . ." as a remedy for violation of a statute which requires no finding of malice.[45] Therefore, beyond the findings of fact necessary

[45] In *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, this Court considered a related problem in construing the attorney's fee provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), which provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." The Court rejected the traditional rule limiting award of attorney's fees to cases of "bad faith" defenses:

> If Congress' objective had been to authorize the assessment of attorney's fees against defendants who make completely

to sustain a judgment that the Act has been violated—findings which would have to be made in an action for injunctive relief only—no further findings are necessary to authorize an award of punitive damages.

The court of appeals found it "highly unusual" for a federal statute to authorize punishment without a jury trial (20a). Yet, judges in patent infringement actions have long had the power to punish by trebling actual damages.[46] Although juries may determine actual damages in many of these cases, nevertheless, judges not juries decide whether to punish, and at times Congress has conferred on courts of equity both the power to decree accounts without juries and treble damages in their discretion.[47]

Moreover, nothing in our common law tradition precludes the infliction of limited money punishments without juries. If Congress had chosen to make discrimination an offense punishable by a $1000 fine only, but no term in prison, the Constitution would not require a jury trial.[48] It would be an odd historical result to require a jury to award $1000

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groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'

*Id.* at 402 fn. 4. Similarly, a new statutory provision would not have been necessary to authorize a punitive damage award for malicious or wanton behavior, and Title VIII should not be read to require a finding of malice.

[46] *Seymour* v. *McCormick*, 57 U.S. (16 How.) 480, 489; *Kennedy* v. *Lakso Co.*, 414 F.2d 1249, 1254 (3rd Cir. 1969); *Swofford* v. *B & W, Inc.*, 336 F.2d 406, 413 (5th Cir. 1964), *cert. denied*, 379 U.S. 962.

[47] *Tilghman* v. *Proctor*, 125 U.S. 136, 148-49; *Filer & Stowell Co.* v. *Diamond Iron Works*, 270 F. 489 (7th Cir. 1921).

[48] *Argesinger* v. *Hamlin*, 407 U.S. 25, 45 fn.2 (concurring opinion).

punitive damages, while a judge alone could impose a $1000 fine.

Finally, the role of punitive damages in the enforcement of the fair housing law should be considered. Often they are an essential complement to a court's injunctive power. Fair housing cases present myriad situations to district courts. There are times when the coercive effect of injunctions may be sufficient to assure compliance with the law. There are also times when it may be preferable to coerce future compliance with a present award of punitive damages in place of the ongoing supervision which an injunction may require. There are other times when a combination of injunction and punitive damages may best assure the effectiveness of the Act. Congress decided it would be appropriate to enforce the right to fair housing by giving one decision maker an array of powers which could be used individually or in combination as necessary to enforce the Act in particular circumstances. In this light, punitive damages under Title VIII are best seen as an adjunct to the district court's equitable powers to coerce compliance with this important statute.

## IV.

**The Decision of the Seventh Circuit Conflicts in Principle With Decisions in Other Circuits on the Right to Juries in Related Civil Rights Actions.**

Other courts of appeals have uniformly rejected demands for juries in employment discrimination cases. Some of these actions were under Title VII of the Civil Rights Act of 1964,[49] and others under 42 U.S.C. § 1983.[50] All sought injunctive relief and money awards to compensate for lost pay, and in all the courts held that back pay awards were part of an equitable remedy.

The decision of the Seventh Circuit seriously jeopardizes this heretofore unbroken line of cases. The court below attempts to distinguish them by analogizing the award of lost pay to the restitution of "ill-gotten gains" (29a), but another court has already exposed the fragile basis of characterizing back pay as a uniquely equitable remedy by showing that a common law lawyer would have had no trouble placing back pay under the rubric of indebitatus assumpsit or an action for breach of contract by wrongful discharge.[51] Whether these statutorily authorized money

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[49] *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *cf. Robinson* v. *Lorillard Corporation*, 444 F.2d 791, 802 (4th Cir. 1971). Even "the use of advisory juries in discrimination cases is not favored. . . ." *Moss* v. *The Lane Company*, No. 72-1628 (4th Cir., Jan. 11, 1973).

[50] *McFerren* v. *County Board of Education*, 455 F.2d 199 (6th Cir. 1972); *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991; *Smith* v. *Hampton Training School*, 360 F.2d 577 (4th Cir. 1966). The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2 (1), now makes it possible to bring employment discrimination cases involving government employers under Title VII.

[51] *Ochoa* v. *American Oil Co.*, 338 F.Supp. 914, 918 (S.D. Tex. 1972).

awards are called "actual damages" or "back pay" their purpose is to remedy an injury caused by unlawful conduct by making victims "whole." [53]

The determination whether or not juries are required cannot depend on a tenuous labeling of money damages as equitable or legal. Rather, it depends on whether Congress has the power to authorize federal judges not only to order injunctive relief but also award money damages to provide complete relief in enforcing civil rights legislation. The decision of the Seventh Circuit that Congress lacks this power conflicts at least in principle and effect with decisions of other circuits. It would be appropriate for this Court to resolve this conflict and provide authoritative guidance to lower federal courts in their administration of the civil rights laws.

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[53] *Bowe* v. *Colgate-Palmolive Company*, 416 F.2d 711, 721 (7th Cir. 1969).

## CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## District Court's Opinion and Order Denying Demand for Jury Trial

May 19, 1970

REYNOLDS, District Judge.

This is an action brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, which prohibits discrimination in the rental of housing. Plaintiff claims that defendants discriminated against her by refusing to rent her an apartment because she is a Negro. Plaintiff requested injunctive relief restraining the rental of the subject apartment except to the plaintiff, money damages for loss incurred by the plaintiff due to the alleged discrimination, punitive damages in the amount of $1,000, and attorney's fees.

The court granted plaintiff's motion for a temporary restraining order on November 17, 1969, and, following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the case. At a hearing on April 30, 1970, the Court, with consent of plaintiff, dissolved the preliminary injunction. Therefore, the only issues remaining in the suit are plaintiff's claim for compensatory and punitive damages and attorney's fees.

The defendants have requested a jury trial on these issues, and plaintiff has objected to this request. The parties have submitted briefs and argued to the court on this issue which is now before the court for decision.

[1, 2] To warrant a jury trial, a claim must be of such a nature as would entitle a party to a jury at the time of the adoption of the Seventh Amendment. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed.

893 (1936); United States v. Louisiana, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950). The question before this court, therefore, is whether the cause of action under 42 U.S.C. §§ 3601-3619 is one recognized at common law which consequently requires a jury trial. I find that this cause of action is a statutory one invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had. The action is not one in the nature of a suit at common law, and therefore there is no right to trial by jury on the issue of money damages in the case.

Defendant argues that the Seventh Amendment of the Constitution; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Harkless v. Sweeny Independent School District, 278 F.Supp. 632 (S. D. Texas 1968); and Ross v. Bernhard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), require a jury trial on the issue of plaintiff's prayer for money damages due to the alleged discrimination.

*Beacon*, *Dairy Queen*, and *Thermo-Stitch* hold that where equitable and legal claims are joined in the same cause of action, there is a right to trial by jury on the legal claims that must not be infringed by trying the legal issues as incidental to the equitable issues or by a court trial of common issues between the two. The Court in Swofford v. B & W, Inc., 336 F.2d 406, 414 (5th Cir. 1964), commented on these cases:

*District Court's Opinion and Order Denying Demand for Jury Trial*

"• • • This is not to say, however, that they have converted typical non-jury claims, or remedies, into jury ones. Therefore, we reject a view that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by jury."

The *Harkless* court granted a jury trial on the issue of back pay award in an action brought under 42 U.S.C. § 1983 seeking reinstatement as teachers following a discharge allegedly based on racial discrimination. However, § 1983 expressly provides that persons acting under color of state law who deprive other persons of constitutional rights shall be liable "in an action at law." There is no such provision in 42 U.S.C. § 3612(c).

The Supreme Court in *Ross* held that plaintiffs in a shareholder's derivative action had a right to a jury trial on those issues to which the corporation, had it brought the action itself, would have had the right to a jury trial. The Court found that where the claims asserted were damages against the corporation's broker under the brokerage contract and rights against the corporate directors because of their negligence, both actions at common law, "• • • it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors. • • •" 396 U.S. at 540, 90 S.Ct. at 739. While Ross may reflect "an unarticulated but apparently overpowering bias in favor of jury trials in civil actions," *Ross, supra*, at 551, 90 S.Ct. at 745, Justice Stewart dissenting, the case does

not stand for the proposition that any money claim in a cause of action must be tried by a jury. The decision deals narrowly with the right to jury trial in a shareholder's derivative action and is clearly distinguishable from the case before this court.

The section of the statute dealing with remedies for violation of the act, 42 U.S.C. § 3612(c), provides:

> "(c) *The court* (emphasis added) may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff *in the opinion of the court* (emphasis added) is not financially able to assume said attorney's fees."

On its face, this statutory language seems to treat the actual damages issue as one for the trial judge rather than a jury. District courts in Hayes v. Seaboard Coast Line Railroad Co., 46 F.R.D. 49 (S.D.Ga.1969), and Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F.Supp. 754 (M.D.Ala. 1969), have construed similar language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g),* to mean that the issue of back pay

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* "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, *the court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may

award in employment discrimination cases does not require jury determination.

Both *Hayes* and *Cheatwood* held that the money damages issue of back pay in an action under 42 U.S.C. § 2000e-5(g) of the 1964 Civil Rights Act was not a separate legal issue, but rather was a remedy the court could employ for violation of the statute in a statutory proceeding unknown at common law, and that there was no right to a trial by jury on that issue. As I have noted, the language of the remedial provisions of 42 U.S.C. § 2000e-5(g) of the Civil Rights Act of 1964 and 42 U.S.C. § 3612(c) of the Civil Rights Act of 1968 are very similar. The purpose of the two acts is similar. Title VII of the 1964 Act prohibits discrimination on the basis of race, color, religion, sex, or national origin by specified groups of employers, labor unions, and employment agencies. Title VIII of the 1968 Act prohibits discrimination on the basis of race, color, religion, or national origin in the sale or rental of housing by private owners, real estate brokers, and financial institutions. The award of money damages in a Title VIII action has the same place in the statutory scheme as does the award of back pay in a Title VII action. Determining the amount of a back pay award in a Title VII action can be as difficult a question of fact as determining the amount of money damages in a Title VIII action. *Hayes*, 46 F.R.D. at 53.

An action under Title VIII is not an action at common law. The statute does not expressly provide for trial by

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include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). * * *" (Emphasis added.)

jury of any issues in the action. In the absence of a clear mandate from Congress requiring a jury trial, I find that the similarities between the remedial provisions of the Civil Rights Act of 1964 and 1968, in light of the undivided authority holding that the issue of money damages for back pay under Title VII of the 1964 Act is not an issue for the jury, compel the conclusion that the issue of compensatory and punitive money damages in an action under Title VIII of the 1968 Act is likewise an issue for the court. Accordingly, defendants' request for a jury trial must be denied.

Therefore, it is ordered that defendants' request for a jury trial be and it hereby is denied.

## District Court's Oral Findings of Fact and Conclusions of Law

October 27, 1970

[205] • • •

The Court: All right. Well, this has been a long and tortuous lawsuit. The action was brought under Title VIII of the Civil Rights Act of 1968, 42 U.S. Code Section 3601-19 which prohibits discrimination in the rental of housing. The Plaintiff has claimed that she was discriminated against by the Defendants in that they refused to rent her an apartment because she was a Negro. The Plaintiff has requested injunctive relief restraining the rental of the apartment except to her, money damages for loss that she has sustained due to the alleged discrimination and punitive damages in the amount of $1,000 and attorney's fees.

I granted the Plaintiff's motion for temporary restraining order on November 17th, 1969 following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the Court. At that time, [206] of the preliminary hearing, I found there was probable cause to believe there was discrimination in this case and that she could probably establish that on a final hearing.

The Court had many conferences with the parties trying to work this out. But to no avail. And at one of those, on the hearing of April 30th, 1970, the Court with the consent of the Plaintiff dissolved the preliminary injunction because by that time the Plaintiff was no longer interested in the apartment. Therefore, the only issue remaining for this hearing today, yesterday and today, was for the claim—the final hearing on the question of

discrimination and the claim for compensatory and punitive damages and attorney's fees.

It appears that on, from the evidence and the entire file and both hearings, October 30, 1969 an advertisement appeared in the Milwaukee Journal, a newspaper published in this city offering for rent this apartment which was located at 2529 North Fratney Street, Milwaukee, Wisconsin. And it appears that Plaintiff Julia Rogers is a black American and Miss Jacqueline Haessly is Caucasian, and the Defendants are at least white, I don't know if they are Caucasian, I never know what these things are, but they are white. At the time the ad appeared in the paper, Mrs. Rogers was hospitalized [207] at St. Mary's Hospital here in Milwaukee. The ad was seen by her friend, Miss Haessly, who called the number given and spoke to the Defendant Mrs. Perez. She asked Mrs. Perez if it would be possible to see the apartment and Mrs. Perez told her she could come over if she could get there by 5:00 p.m. of that day. Miss Haessly went to see the apartment, arriving there at 4:30 p.m. on October 30th, 1969. Mrs. Perez is a cousin of Mrs. Loether and Mrs. Perez took Miss Haessly to see the upstairs apartment. Miss Haessly told Mrs. Perez that she was looking for a place for a friend of hers who was in the hospital. Mrs. Perez stated that Mr. and Mrs. Loether were coming over that evening, that they would have to make the decision as to whether or not Miss Haessly could have the apartment for Mrs. Rogers. Miss Haessly stated that she was very interested in obtaining the apartment and asked Mrs. Perez if she, that is Mrs. Haessly, should offer a deposit, and would the deposit be accepted. Mrs. Perez told Miss Haessly that she would call Mrs. Loether and Mrs. Loether was in fact called and

Miss Haessly spoke to Mrs. Loether and to find out whether or not a deposit would be accepted.

It appears that in that conversation, Mrs. Loether asked various questions about Mrs. Rogers, such as where she was hospitalized, how many children in the [208] family, marital status and financial status, but in any event, did not ask about race, and Mrs. Loether then asked to speak to Mrs. Perez and Mrs. Perez as a result of these conversations was authorized by Mrs. Loether to accept a deposit and to give a receipt. At least she did accept a deposit and she did give a receipt.

And up until that time, there was no problem. I think up until that time, there is no question in my mind, that the apartment was rented, at least effectively rented. Then Mrs. Loether requested Mrs. Haessly and was given the hospital room number and she talked to Mrs. Rogers and then she called Mrs. Rogers at the hospital and discussed the rental of the apartment at which time Mrs. Rogers advised Mrs. Loether that she, Mrs. Rogers, was a black person. Then for the first time the question of race came up and Mrs. Loether became concerned about the race of the prospective tenant and, as I see it, the rental of the apartment was revoked at that stage and it was revoked because of race, at which time Miss Haessly came back into the picture and made it clear to Mrs. Loether that that was against the law, she could not do that. And the testimony indicates it was about this time that Mr. Loether came in and also learned that he was told that he had to rent this apartment to someone that he didn't want to rent it to, and that he believed that no one is going to tell him

what to do. Well, that is a difficult question. I think that the law does tell him what to do. And he may find that very difficult to accept. But it is the law nevertheless. The deal was closed, it was effectively closed. Mrs. Perez in effect became the agent of these people to rent the apartment. She rented the apartment and then the deal, after it was closed, when race was mentioned, it was revoked and then I think that the acts of Miss Haessly in telling them—I am not saying she didn't have a right to do this, but I think her act of telling the Loethers that they had to rent it probably hardened their position. In short, I think but for the race of Mrs. Rogers, she would have had the apartment, because that was the only question these people were talking about from that time on. They haven't discussed anything else really.

I don't believe it's necessary for me to go into all the details—well, I might as well. In any event, Mrs. Loether who then actually went to see Mrs. Rogers at the hospital, to see if they could work out something, but it turned out that that could not be worked out.

I am also mindful of the fact that Mr. Loether, being a little stubborn about this, and I do not look [210] upon the Loethers certainly as the worst and most bigotted people I have come in contact with in this world, and that is what makes this case more difficult than some. Now, we get to the questions—although I am satisfied that there is only one conclusion I can reach and that is the apartment was not rented because of the race of Mrs. Rogers and therefore it's a violation of the Federal law.

*District Court's Oral Findings of Fact and Conclusions of Law*

Now, we come to the questions of damages. The Loethers have indicated or did indicate they were willing to rent this to a black person but they consistently maintained the position they were not willing to rent it to Mrs. Rogers, and therefore I think that that—here we are interested in Mrs. Rogers' rights, but I recognize the property was vacant for an extended period of time and the Loethers have been subjected to a lot of expenses. I do not believe there have been any compensatory damages proven in this case or out-of-pocket expenses of that nature, but I do think that an award of $250 in punitive damages will be in order. It probably takes the wisdom of a Solomon to decide these cases fairly, but that is the best I can do. And I think under all the circumstances, I am not going to award—I know Milwaukee Legal Services is very interested in establishing the position that they should [211] be entitled to attorney's fees in these matters and maybe they should in the proper case, but considering everything in this case, I am just not going to award any attorney's fees and costs.

Thank you, gentlemen.

Mr. Tucker: If Your Honor please,—

The Court: You may draft an order in accordance with this opinion.

Mr. Tucker: I was wondering about the costs. You are not awarding costs?

The Court: No.

Mr. Tucker: Very well, sir.

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## Judgment of District Court

December 7, 1970

This action came on for trial before the Court, Honorable John W. Reynolds, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that the plaintiff, Julia Rogers, recover of the defendants, LeRoy Loether, Mariane Loether and Mrs. Anthony Perez $250.00 as punitive damages; further ordered, that compensatory-actual damages, costs and attorney's fees are hereby denied.

**Opinion of Court of Appeals**

# In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1145

JULIA ROGERS,
*Plaintiff-Appellee,*
v.
LEROY LOETHER and MARIANE LOETHER, his wife and MRS. ANTHONY PEREZ,
*Defendants-Appellants.*

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 69-C-524

JOHN W. REYNOLDS, *Judge.*

ARGUED FEBRUARY 22, 1972 — DECIDED SEPTEMBER 29, 1972

Before SWYGERT, *Chief Judge,* STEVENS, *Circuit Judge,* and CAMPBELL, *District Judge.**

STEVENS, *Circuit Judge.* The question presented is whether appellant was entitled to a jury trial in an action for compensatory and punitive damages brought under § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612.[1]

In her complaint, plaintiff alleged that the three defendants had refused to rent her an apartment because of

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

[1] Section 812 provides, in part:

"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action

her race.[2] She requested injunctive relief restraining defendants from renting the apartment to anyone else, money damages for her actual losses, punitive damages of $1,000, and attorney's fees.

The district court, after an extended hearing, entered a preliminary injunction. Subsequently, with plaintiff's consent, the injunction was dissolved; thereafter only plaintiff's claims for compensatory and punitive damages and attorney's fees remained. Defendants' request for a jury trial of those issues was denied. After trial, the court found that plaintiff had suffered no actual damages but assessed punitive damages of $250; the prayer for attorney's fees was denied.

On appeal defendants contend that the finding of discrimination is clearly erroneous, that it was error to award punitive damages, and that they were entitled to a jury trial. We shall not describe the evidence of discrimination except to note that it was marginal; whichever way the trial judge had ruled, his determination of that issue would not have been clearly erroneous.[3] We are also

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[1] (Continued)

shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: . . . .

* * *

"(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 82 Stat. 88, 42 U.S.C. § 3612.

[2] Section 804 of the 1968 act provides, in part:

"As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." 82 Stat. 83, 42 U.S.C. § 3604.

[3] Defendants contend that their refusal was motivated by the obnoxious behavior of a white social worker who was helping the plaintiff find an apartment; they had offered to rent the apartment to any black tenant other than the plaintiff and offered considerable evidence of absence of racial prejudice by either themselves or other tenants in the apartment. On the other hand, plaintiff's evidence tended to indicate that negotiations proceeded smoothly until defendants learned that plaintiff was a Negro.

satisfied that if his finding of discrimination is accepted, an award of punitive damages was authorized by the statute notwithstanding the absence of any actual loss to the plaintiff.[4] We shall confine our analysis to the jury trial issue.

The district court held that a jury trial was not required by the Seventh Amendment[5] or by a fair interpretation of the statute.[6]

The court rejected the constitutional claim on the grounds (1) that the cause of action was created by statute and not recognized at common law; and (2) that the statutory claim invoked the equitable powers of the court and the amendment has no application to the recovery of money damages as an incident to complete equitable relief. Both propositions are supported by *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49.[7]

The district court also considered the award of damages in a housing discrimination case arising under the 1968 Act analogous to an award of back pay in an employment discrimination case under the Civil Rights Act of 1964 and therefore relied on cases holding that there is no right to a jury trial in such litigation.[8] In its opinion the district court placed no reliance on the argument, sometimes advanced by proponents of civil rights legislation, that al-

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[4] As we read the statute it does not require a finding of actual damages as a condition to the award of punitive damages. In any event, in other litigation the federal courts have held that punitive damages may be awarded without requiring an award of compensatory damages. See, *e.g.*, *Wardman-Justice Motors, Inc.* v. *Petrie*, 39 F.2d 512, 516 (D.C. Cir. 1930); *Basista* v. *Weir*, 340 F.2d 74, 85-88 (3rd Cir. 1965). The *Basista* case involved a suit against policemen for punitive damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

[5] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." United States Constitution, Amendment VII.

[6] The opinion is reported at 312 F. Supp. 1008.

[7] The district court also cited *United States* v. *Louisiana*, which holds that the Seventh Amendment is "applicable only to actions at law." 339 U.S. 699, 706.

[8] *Hayes* v. *Seaboard Coast Line R.R.*, 48 F.R.D. 49 (S.D. Ga. 1970); *Cheatwood* v. *South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969).

lowance of a jury trial might undermine effective enforcement of the statute.[9]

Our study of the issue persuades us that (1) the constitutional right to trial by jury applies in at least some judicial proceedings to enforce rights created by statute; (2) this action for damages is "in the nature of a suit at common law";[10] (3) the nature of the claim is "legal" within the test identified in *Ross* v. *Bernhard*, 396 U.S. 531, 538; (4) the right to a jury trial may not be denied on the ground that the damage claim is incidental to a claim for equitable relief; (5) cases involving an award of back pay pursuant to the 1964 Act are inapplicable; and finally (6) in view of our grave doubts as to the constitutionality of a denial of the right to a jury trial and the failure of Congress expressly to indicate that the traditional procedure for litigating damage claims should not be followed, the statute should be construed to authorize trial by jury. Accordingly, we have decided to reverse.

## I.

The Seventh Amendment preserves the substance of the right to a jury trial which existed under English common law when the amendment was adopted.[11] It has never been suggested that the application of the amendment is narrowly confined to such common law writs as might be enforceable in a federal court. On the contrary, since the bulk of the civil litigation in the federal judicial system involves the assertion of a federal right derived either from an act of Congress or the Constitution itself, necessarily the principal significance of the Seventh Amend-

[9] See, *e.g.*, mention of such factors in Note, Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws, 69 Colum. L. Rev. 1019, 1051; Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167; Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1264. Among the cases, see *Hayes* v. *Seaboard Coast Line R.R.*, 48 F.R.D. 49, 53 (S.D. Ga. 1970); *Lawton* v. *Nightingale*, ..... F. Supp. ....., 41 U.S.L.W. 2041 (D.C. Ohio, June 27, 1972).

[10] See *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. at 48.

[11] *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657.

ment has been in such cases.[12] It is perfectly clear that the fact that a litigant is asserting a statutory right does not deprive him or his adversary of the protection of the amendment.

In *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, Mr. Justice Story, writing for the Court, rejected the contention expressed by Mr. Justice M'Lean in dissent that the amendment was inapplicable because the claim arose not under the common law but rather under the statutes of Louisiana.[13] Mr. Justice Story focused on the character of the claim as a "legal right" and eloquently described the purpose of the amendment:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'In suits at common law, where the value in controversy shall

[12] "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob* v. *New York City*, 315 U.S. 752.

[13] "It is not strictly a common law proceeding; but a proceeding under the peculiar system of Louisiana; . . . .

* * *

"In the state of Louisiana, the principles of common law are not recognized; neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other states. This system may be called the civil law of Louisiana, and is peculiar to that state." 28 U.S. at 449-450 (Mr. Justice M'Lean dissenting).

exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any Court of the United States, than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law, they meant what the constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." 28 U.S. at 445-446.

In an unbroken line of cases involving enforcement of statutory rights, the Supreme Court has treated the right to a jury trial as a matter too obvious to be doubted. Thus, in a civil action to recover a statutory penalty for a violation of the immigration laws, the first Mr. Justice Harlan, speaking for the Court, said that the "defendant was, of course, entitled to have a jury summoned in this case." *Hepner* v. *United States*, 213 U.S. 103, 115. In an action for treble damages under § 7 of the Sherman Act,

Mr. Justice Holmes, also speaking for a unanimous Court, considered it plain that "the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29. In a case alleging violation of the Safety Appliance Act of 1910, which did not expressly authorize a private remedy, the Court found an implied right to recover damages in a jury trial "according to a doctrine of the common law." *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 39. In a case involving an ambiguous claim for damages, either as an amount due under a contract or as a statutory claim for damages for trademark infringement, the Court held that the claim was "wholly legal in its nature however the complaint is construed" and that the "constitutional right to trial by jury" was applicable to the claim. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477. And in an action brought under § 4 of the Clayton Act, the Court has expressly characterized the right to a jury trial as "constitutional." *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 510.[14]

*N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, does not hold—as is sometimes assumed—that no jury trial is required in a cause of action created by statute since any such action would have been unknown to the common law and therefore beyond the reach of the Seventh Amendment. The *Jones & Laughlin* opinion expressly recognizes that the amendment is applicable not only to a suit at common law, but also to a judicial proceeding "in the nature of such a suit." The distinction drawn in the opinion is not between substantive rights derived from the common law as opposed to those created by statute;

[14] "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trial by the court, that discretion is very narrowly limited and must, wherever possible, be exercise to preserve jury trial." *Id.* at 510.

It is of interest that in the elaborate argument presented to us in *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11 (7th Cir. 1972), *cert. denied*, ... U.S. ..., 40 U.S.L.W. 3617 (June 26, 1972), in which the decision turned on the constitutional right to a jury trial in an action asserting rights under § 10(b) of the Securities Act of 1934, none of the defendants even suggested that the statutory source of plaintiffs' claim affected their right to demand a jury.

it is the difference between a proceeding "in the nature of a suit at common law" and a "statutory proceeding."[15]

The Court's reference to a "statutory proceeding" rather than to a judicial proceeding brought to redress a right created by statute is important. Cases such as *Parsons* v. *Bedford* and *Fleitmann* v. *Welsbach Co.* were such judicial proceedings, and their teaching is not undermined in the slightest by the *Jones & Laughlin* holding. The procedure approved by *Jones & Laughlin* was, of course, fundamentally different from a common law trial. It was administrative rather than judicial and did not invoke the original jurisdiction of a court in determining factual issues or fashioning a remedy. The initial case was not "tried" in a court of law or equity; it was "tried" in a separate *proceeding* created by statute.[16]

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[15] The Court's entire discussion of the Seventh Amendment issue occupies less than one page of a 27-page opinion. That page includes the Court's discussion of both the historic view that no jury is required if the recovery of damages is an incident to equitable relief (a proposition discussed in part IV of this opinion) and to the statutory proceeding point. The Court said:

"The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields* v. *Thomas*, 18 How. 253, 262; *In re Wood*, 210 U. S. 246, 258; *Dimick* v. *Schiedt*, 293 U. S. 474, 476; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 657. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. *Clark* v. *Wooster*, 119 U. S. 322, 325; *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 279. It does not apply where the *proceeding* is not in the nature of a suit at common law. *Guthrie National Bank* v. *Guthrie*, 173 U. S. 528, 537.

"The instant case is not a suit at common law or in the nature of such a suit. The *proceeding* is one unknown to the common law. It is a *statutory proceeding*. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." 301 U.S. at 48–49. (Emphasis added.)

[16] That this is what the Court meant when it referred to a "*proceeding* . . . not in the nature of a suit at common law" (emphasis added) is clear from the case which it cites to support the statement, *Guthrie National Bank* v. *Guthrie*, 173 U.S. 528. In that case a territorial legislature set up a special commission that did not include a jury to hear certain claims against a municipality. The claims had no legal force, but the legislature thought it equitable to provide for their payment in appropriate cases. While a court became involved in approving or disapproving the recommendations of the commission, it is clear that the *proceeding*, and not merely the right to relief, was statutory. See Developments, *supra* note 9, 84 Harv. L. Rev. at 1266–1268.

Here there is no statutory *proceeding*. The statute authorizes a "civil action" in the courts of the United States. The rights protected and the relief available are set forth in the statute, but the proceeding is not statutory in the *Jones & Laughlin* or *Guthrie*[17] sense.[18] The issue we must consider, therefore, is whether an action for damages authorized by the Civil Rights Act of 1968 is, in the language of *Jones & Laughlin*, "in the nature of a suit at common law."

## II.

There are three reasons why this action is the kind of case which is appropriately described as in the nature of a suit at common law.

First, the tribunal whose jurisdiction is invoked is a court created pursuant to Article III of the Constitution. Unquestionably, congressional power to prescribe the procedures to be employed in such a court is limited by the Constitution and specifically by the Seventh Amendment.[19] The proceeding is judicial in character rather than administrative or "statutory." In all respects—at least all except the right to a jury trial if our appraisal of that right is not correct—it is clear that the procedure to be

[17] See note 16, *supra*.

[18] In making a similar analysis of *Jones & Laughlin* in the context of a damage remedy for employment discrimination under Title VII of the Civil Rights Act of 1964, one commentator drew this conclusion: "The Court there held that a jury trial was not required in a 'statutory proceeding'; its concern was to protect the comprehensive administrative scheme of the NLRB, which would have been substantially destroyed if jury trials were required. The relevant distinction thus appears to be between those statutory actions which invoke an administrative process and those which do not. If the Congress makes a judgment that a comprehensive scheme of administrative adjudication is required, the Court will be willing to find that it is a 'statutory proceeding' to which the seventh amendment has no application. If, however, a statutory claim is entrusted to court decision, where there is no functional justification for not granting a jury trial, and the claim is for the type of relief normally awarded by a court of law, as would be the case in an action for compensatory damages under Title VII, the similarity to common law forms of action will require a jury trial." Developments, *supra*, note 9, 84 Harv. L. Rev. at 1267-1268.

[19] In *Minneapolis & St. Louis R.R.* v. *Bombolis* the Court expressly noted that "the Seventh Amendment is controlling upon Congress." 241 U.S. 211, 219.

followed in this case is precisely that which is applicable to suits at common law which are tried in the federal judicial system.

Second, the remedy sought, including both compensatory and punitive damages, is the relief most typical of an action at law. If, as the scholars have consistently indicated, we should look to history for guidance in determining whether or not a claim is of the kind which is triable to a jury,[20] unquestionably, the prayer for damages points to that result.[21]

Finally, the nature of the substantive right asserted, although not specifically recognized at common law, is analogous to common law rights. An English innkeeper who refused, without justification, to rent lodgings to a traveler was apparently liable in an action at law triable to a jury.[22] Refusing to rent an apartment on the false ground

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[20] The proposition that we should look to history for guidance is well settled. See 5 Moore's Federal Practice ¶ 38.11 [7]; 9 Wright and Miller, Federal Practice and Procedure, Civil § 2302; James, Civil Procedure § 8.1 at p. 338 (1965). Even the dissenters in *Ross* v. *Bernhard* agreed, 396 U.S. 531, 543 n.1.

[21] Damages, of course, were traditionally awarded in legal actions to compensate a plaintiff for a breach of a legal duty owed him by defendant. That duty may be prescribed by the common law (*e.g.*, the tort law of negligence), by contract or by statute. The origin of the duty does not necessarily determine the nature of the suit. In *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, for example, the Court found an implied remedy for damages for violation of the duty placed upon defendant by the Safety Appliance Act. The case was tried to a jury. In concluding that a jury trial was required in a suit seeking damages under the Labor-Management Reporting and Disclosure Act of 1959, the Fourth Circuit said in part:

> "The right asserted is indeed one created by statute, but we do not agree that a jury trial is necessarily unavailable because the suit for damages is one to vindicate a statutory right. There is no such cleavage between rights existing under common law and rights established by enacted law, where the relief sought is an award of damages." *Simmons* v. *Avisco, Local 713, Textile Workers Union*, 350 F. 2d 1012, 1018 (1965).

[22] "Thus innkeepers, who have nowhere been described as public utilities, have from early times been subject to the obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him." *Davies Warehouse Co.* v. *Brown*, 137 F.2d 201, 207 (Emerg. Ct. App. 1943), and cases there cited. *Davies* was reversed on other grounds, 321 U.S. 144. See also *Thomas* v. *Pick Hotels Corp.*, 224 F.2d 664, 666 (10th Cir. 1955) (common law action against innkeeper for discrimination sounds in tort); 43 C.J.S. Innkeepers, § 9 at p. 1149.

that an applicant is an unfit tenant, when race is the real motivation is a species of defamation; libel and slander, of course, are common law causes of action. Discrimination might involve mental distress or other emotional harm, and the developing common law of torts recognizes a cause of action for the intentional infliction of emotional harm.[23] We thus conclude that a suit for damages for discrimination in the sale or rental of housing facilities is sufficiently analogous to a suit at common law to be appropriately characterized as a "legal" claim triable to a jury.

III.

Although the full implications of the Supreme Court's decision in *Ross* v. *Bernhard*, 396 U.S. 531, have yet to be determined, it is clear that mere analogy to history may not be sufficient to define the scope of the Seventh Amendment. In that case the constitutional right to a jury trial was held to encompass at least some claims in litigation which historically had been the exclusive province of equity. That was a derivative action brought by a shareholder in the name of a corporation. The shareholder's standing to litigate was governed by equitable principles; the corporate claim which he asserted was, at least in part, legal[24]

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[23] At common law, an inkeeper was liable in damages for insulting or abusing his guests or indulging in any conduct resulting in unnecessary physical discomfort or distress of mind. See *Odom* v. *East Avenue Corp.*, 178 Misc. 363, 34 N.Y.S. 2d 312 (1942), *affirmed*, 37 N.Y.S. 2d 491, 264 App. Div. 985 (complaint seeking damages against innkeeper for failure to serve guest in hotel restaurant because of race states common law cause of action). Professors Gregory and Kalven have suggested that the logic of the common law development of the dignitary tort might well apply in cases of racial discrimination. Gregory & Kalven, *Cases and Materials on Torts* 961 (2d ed. 1969). In addition, a racial discrimination suit might also be considered analogous to the so-called "new tort" for extreme and outrageous conduct which results in emotional harm. As to this "new tort," see *Eckenrode* v. *Life of America Ins. Co.*, .... F.2d .... (7th Cir. Aug. 3, 1972, No. 71-1103).

[24] "In the instant case we have no doubt that the corporation's claim is, at least, in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence. Under these circumstances it is unnecessary to decide

History was unquestionably relevant to the Court's analysis of the question whether a jury trial was required in such a case. But, following the lead set in *Beacon* and *Dairy Queen*, the traditional treatment of the entire litigation was subordinated to the traditional characterization of particular claims. Thus, the Court had "no doubt" that a claim for money damages predicated on breach of contract or gross negligence was legal in charcter.

This conclusion did not rest, as it might, simply on the fact that such a claim was enforceable at common law in England in 1791. Instead, the Court identified history as only one of three criteria that should be considered in determining the "legal" nature of an issue. The other two were: "second, the remedy sought; and, third, the practical abilities and limitations of juries."[25] Indeed, not only did the Court identify these two additional criteria; it also implied, without expressly stating, that history may be a less reliable guide than the other two.[26] We have already concluded that under an historical analysis a jury trial is required in the present case; we proceed to consider the other two criteria.

Under the second and third criteria identified in *Ross* v. *Bernhard*, the civil rights claim asserted in this case was certainly appropriate for determination by a jury. The relief sought was actual damages and punitive damages. Both the determination of the amount which would adequately compensate a litigant for an unliquidated claim and the punitive element of the award are appropriate for jury determination. As we have already discussed, juries historically have been required where the remedy sought was damages, either compensatory or punitive.

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[24] (Continued)

whether the corporation's other claims are also properly triable to a jury. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962)." 396 U.S. 531, 542-543.

[25] "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. *Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.*" 396 U.S. at 538 note 10. (Emphasis added.)

[26] In the preceding footnote we have emphasized the language which so implies.

The "practical abilities and limitations of juries" obviously present no obstacle to their determination of the issues presented in these civil rights cases. Typically, the facts are not complex and decision turns on appraisals of credibility and motive. Certainly such matters are far more suitable for jury determination than complicated commercial issues that routinely arise in derivative and antitrust litigation. Thus, the third as well as the second criterion identified in *Ross* v. *Bernhard* strongly militates in favor of recognition of the right to a jury trial in a case of this kind.

History indicates that a jury trial is required. And if the Supreme Court adheres to its identification of two additional criteria in *Ross* v. *Bernhard*, both the damage relief sought and the character of the issue to be tried compel the conclusion that the litigants are entitled to a jury.

## IV.

The *Jones & Laughlin* holding that the Seventh Amendment is inapplicable to an N.L.R.B. proceeding terminating in the entry of an order directing reinstatement and awarding back pay was supported not only by the Court's characterization of the proceeding as statutory, but also by reference to chancery practice in which damages could be awarded as an element of complete equitable relief.[17] In this case the district court also regarded the relief authorized by the 1968 Act as primarily equitable and considered it appropriate to award damages as incident to such relief.

As the case developed, the defendant's right to demand a jury was not determined until after plaintiff's claim for equitable relief had been abandoned. Nevertheless, we share the district court's view that the right to a jury trial in this kind of case may properly be tested by the character of the relief requested in plaintiff's complaint. Our decision is not predicated on the special circumstance that only the damage claims remained when defendant's demand for a jury was denied.

[17] See quotation from the Court's opinion in footnote 15, *supra*.

At common law, a court of equity, in a proceeding properly before it, would hear and determine any legal issues incidental to the equitable issues and award any legal relief which might be incidental to equitable relief.[28] Multiplicity of suits could thus be avoided. And if equitable relief were no longer appropriate, the chancellor might nevertheless award damages or, in his discretion, permit the complaint to be amended to state only a legal claim which would then be triable to a jury.[29]

Today, however, legal and equitable issues can both be raised in one "civil action" under the Federal Rules. Thus, the avoidance of a multiplicity of suits and the desire to afford a complete remedy in one proceeding are no longer justifications for the "incidental" power of an equity court to award money damages. The right of the court, without a jury, to award "incidental" legal relief was nevertheless thought secure under the Federal Rules until the Supreme Court indicated differently in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469.

In *Beacon*, the Court upheld the petitioner's right to a jury trial of his counterclaim for treble damages under the antitrust laws which he had asserted in response to a complaint seeking, in part, equitable relief. In *Dairy Queen*, plaintiff sought injunctive relief against use of a trademark and an accounting to determine the amount due under a contract deemed breached. The district court held that the proceeding was either "purely equitable" or that any legal issues were "incidental" to the equitable issues. Mr. Justice Black, speaking for the Court, disposed of the "incidental" issue quite bluntly: "[N]o such rule may be applied in the federal courts."[30] Referring to *Beacon*, he wrote:

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[28] For purposes of our discussion of this "incidental to equitable relief" issue, we will assume, without deciding, that compensatory damages comparable to those sought herein might have been recovered in an 18th century chancery proceeding in which equitable relief appropriate when the suit was filed later became inappropriate.

[29] See generally 5 Moore's Federal Practice, ¶ 38.19[2]; 9 Wright & Miller, Federal Practice and Procedure, Civil § 2308, at pp. 42–43.

[30] 369 U.S. at 470. The complete sentence was:

"At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—based upon the view that the right to trial by jury may be lost

"The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances,' *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. There being no question of the timeliness or correctness of the demand involved here, the sole question which we must decide is whether the action now pending before the District Court contains legal issues."[31]

It would appear that *Beacon* and *Dairy Queen* have mandated that once any claim for money damages is made, the legal issue—whether defendant breached a duty owed plaintiff for which defendant is liable in damages—must be tried to a jury whether or not there exists an equitable claim to which the damage claim might once have been

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[30] (Continued)

as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts." *Ibid.*

[31] *Id.* at 472-473. Preceding the quotation in the text, the Court wrote: ". . . Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc.* v. *Westover*, . . . ." *Id.* at 472.

considered "incidental."[32] We therefore conclude that the right to a jury trial of a claim for damages under the Civil Rights Act of 1968 may not be denied on the ground that such damages are merely incidental to the prayer for injunctive relief.[33]

V.

Since the district court relied on several cases[34] holding

[32] "Since the decision of the Supreme Court in *Beacon Theatres, Inc.* v. *Westover*, and *Dairy Queen, Inc.* v. *Wood*, it is clear that there is a right to a jury trial on an issue of damages, whether they are pleaded independently, or as an incident to a request for an injunction." 5 Moore's Federal Practice ¶ 38.24[1] at p. 190.4. See also ¶ 39.19[2] at p. 172.1.

There is an equitable remedy of restitution which would not, of course, be eliminated by these decisions. In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, the Court recognized that in the government's suit for an injunction to enforce the Emergency Price Control Act of 1942, the government might recover overcharges as restitution. The Court thought the equitable remedy of restitution appropriate—even though not specified in the statute—because it was incidental to other equitable relief and because its use would be appropriate to the enforcement of the statute. But these were justifications for the awarding of relief concededly equitable. The statute also permitted a private suit for damages and a government suit for damages (in the nature of penalties as the Court described them); in either case the damages might be trebled. The Court noted that restitution "differs greatly from the damages and penalties which may be awarded." *Id.* at 402. These remedies were expressly identified as legal in nature, and hence a jury trial would have been required.

[33] It seems quite clear that the punitive damages in this case cannot be considered "incidental" to equitable relief. See note 44, *infra*. See also *Porter* v. *Warner Holding Co.*, 328 U.S. 395, in which the Supreme Court viewed the government's right to sue for damages under the Emergency Price Control Act of 1942 as an action at law for "penalties." *Id.* at 401-402. See also *United States* v. *Jepson*, 90 F. Supp. 983 (D.N.J. 1950). But *cf. United States* v. *Shaughnessy*, 86 F. Supp. 175 (D. Mass. 1949). The *Shaughnessy* court held that the government could recover statutory penalties along with an injunction under the Housing and Rent Act of 1947. One basis for the decision, that the damages could be considered "incidental" to equitable relief, is now obsolete in view of *Beacon* and *Dairy Queen*. The other basis was that the "damages sought are in the nature of a penalty when sued for by the United States, and this right to sue exists only where the tenant himself has failed to bring his action. It is essentially what would be an old action in equity and as such, is triable before a court without a jury." *Ibid.* Professor Moore is critical of this decision. 5 Moore's Federal Practice ¶ 38.37[1] at 307. The court failed to mention either the Supreme Court's decision in *Porter* or the general proposition that equity will not avoid damages penal in character. To the extent that it may have viewed the suit as one in equity because the government stood in the shoes of the individual tenant, *Ross* v. *Bernhard*, 396 U.S. 531 (discussed in the text, *supra*), has clearly eliminated that basis for denying a jury trial.

[34] See note 8, *supra*. See also *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Harkless* v. *Sweeny Independent*

that in an employee's suit for reinstatement and back pay under Title VII of the Civil Rights Act of 1964, the employer is not entitled to a jury trial, we should briefly indicate why we think the reasoning of those cases is inapplicable here.

First, insofar as the cases hold that back pay is a legal remedy which may be recovered as incidental to equitable relief, we believe they cannot stand in the face of *Beacon* and *Dairy Queen*.

Second, to the extent that they hold, relying on *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, that a jury trial is not required because the right vindicated is a statutory right, we reject the conclusion because it fails to differentiate between a statutory proceeding and the enforcement of a statutory right in an ordinary "civil action" in the courts.

Third, an acceptable rationale for awarding back pay in a non-jury judicial proceeding is consistent with our analysis of the damage claims asserted in this case. It is not unreasonable to regard an award of back pay as an appropriate exercise of a chancellor's power to require restitution.[35] Restitution is clearly an equitable remedy. As Professor Moore put it:

> "In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives."[36]

The retention of "wages" which would have been paid but for the statutory violation (of improper discharge) might well be considered "ill-gotten gains"; ultimate pay-

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[34] (Continued)

*School District*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (no jury trial for back pay claim under 42 U.S.C. § 1983); *Culpepper v. Reynolds Metals Co.*, 296 F.Supp. 1232, 1239-1243 (N.D. Ga. 1968), *reversed on other grounds*, 421 F.2d 888 (5th Cir. 1970). *Cf. Ochoa v. American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972) (court writes in depth opinion contrary to these prevailing cases but follows circuit precedent in denying jury trial).

[35] This reasoning is applicable to 42 U.S.C. § 1983 as well since that statute authorizes not only "an action at law" but also a "suit in equity."

[36] 5 Moore's Federal Practice ¶ 38.24[2] at p. 190.5.

ment restores the situation to that which would have existed had the statute not been violated.[37]

The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses—tangible and intangible—which plaintiff has suffered by reason of a breach of duty by defendant. Such damages, as opposed to rent overcharges,[38] unpaid overtime wages,[39] or back pay, cannot properly be termed restitution.[40]

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[37] Similarly, rent overcharges might be termed "ill-gotten gains." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, discussed in note 32, *supra*. Attempts have been made to distinguish private actions and actions intended to correct an offense against the public interest, with the conclusion that a jury trial need not be afforded in the latter situation. In addition to the analytic difficulty with this public-private distinction, see Note, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167, 175-176, we fail to see how this makes any difference in the application of the Seventh Amendment. Whether a purely private wrong or a wrong somehow associated with the public interest is to be vindicated, if Congress chooses to permit its vindication by a "civil action" in the courts, it must respect the commands of the Seventh Amendment. Suits to collect statutory penalties —clearly suits brought to redress offenses against the public interest— have long been considered suits to collect a debt which are triable to a jury. See *Hepner* v. *United States*, 213 U.S. 103, and cases there cited. See also *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29; *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 510. This "public interest" concept might appropriately be used as a persuasive justification for the use of the equitable remedy of restitution. See *Porter* v. *Warner Holding Co.*, 328 U.S. at 402. The court in *Wirtz* v. *Jones*, 340 F.2d 901, 905 (5th Cir. 1965) referred to the fact that the suit was "to redress a wrong done to the public good" when it denied a jury trial in a suit by the government to enjoin violation of the Fair Labor Standards Act and to compel payment of withheld wages. However, the opinion makes it clear, citing as it does the *Porter* case, that the court was speaking of the equitable power to order restitution. If the remedy cannot fairly be characterized as restitution, however, the fact that the recovery sought is to redress a wrong done to the public good should not affect the right to a jury trial.

[38] *Porter* v. *Warner Holding Co.*, 328 U.S. 395. See note 32, *supra*.

[39] *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965). See note 37, *supra*. If, however, an employee rather than the government sues for back wages and liquidated damages under the Fair Labor Standards Act, the action is triable to a jury. See cases cited in *Wirtz* at p. 904. The employee's action is generally viewed as analogous to a common law action of debt or assumpsit. The liquidated damages available to an individual plaintiff would not be recoverable in equity as restitution. In any event, the same recovery available as restitution in equity might also be available in the common law action for general assumpsit. See 5 Moore's Federal Practice ¶ 38.24[2] at p. 190.5.

[40] One commentator's observation in the Title VII situation might apply equally well to other instances of restitution:

Whether or not the jury trial issue was correctly resolved in the back pay cases arising under the 1964 Act,[41] we are satisfied that they are not applicable to the question presented to us under the 1968 statute.

VI.

As the district court correctly emphasized, there are persuasive reasons for interpreting § 812 to authorize "the court" but not a jury to award damages to an injured party. When those words are used in connection with the allowance of fees, they clearly describe the judge rather than the jury[42] Therefore, it is argued that the same words in the clause providing that the "court" may award damages must also refer to the trial judge rather than the jury.

The argument is persuasive but not compelling. The "award" may refer to the entry of judgment by the court just as the amount which a plaintiff may "recover" in antitrust litigation is finally determined by the court's judgment rather than the verdict of a jury, which is unmentioned in the Clayton Act but is undeniably required if demanded by either party.

Other language in the statute implies, without expressly stating, that a jury's participation is appropriate. The statutory reference to "damages" and also to "punitive damages" would normally contemplate a jury verdict as an element of the judicial process leading up to the final

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[40] (Continued)

"However, it is important to note that the highly subjective questions of damages, which are often felt to be particularly appropriate for jury determination, are not present in Title VII cases. Back pay awards usually involve a definite amount for a definite period of time, and the total amount in controversy often can be stipulated by the parties. Most problems in determining the amount of a back pay award would be ones of computation rather than subjective evaluation." Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167, 173 (1969).

[41] We note the conflicting views expressed by Judge Noel in *Ochoa v. American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972), but we, of course, express no opinion on the issue since it is not before us.

[42] The proviso to subparagraph (c) states that the prevailing plaintiff shall be awarded fees if "said plaintiff in the opinion of the court is not financially able to assume said attorneys' fees." 42 U.S.C. § 3612(c).

award."[43] Certainly it is highly unusual for a federal statute to authorize a court to impose punishment, even if limited to $1,000, without according the defendant the right to a jury trial."[44]

The term "civil action" in legislation enacted since the merger of law and equity in 1938 is comparable to the words "action at law" or "suit in equity" which were used previously.[45] The words "action at law" implied a right to jury trial. The words "civil action," as *Beacon, Dairy Queen* and *Ross* make clear, do not in any sense imply that there is no right to a jury trial—a "civil action" asserting a legal claim is triable to a jury.

The legislative history of the 1968 act is silent on the question. There is no evidence that the proponents of the legislation expressed fear that the right to a jury trial would undermine the statute's effectiveness, or conversely, that opponents accepted any compromise in reliance on an assurance that juries could be demanded. The policy considerations which prompted the legislation probably favor a denial of the right; on the other hand, the more basic constitutional considerations which surround the

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[43] Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e-5(g), provides for back pay but not for "damages" or "punitive damages."

[44] A court of equity would not enforce a penalty or forfeiture absent a specific statutory authorization. See *Livingston* v. *Woodworth*, 56 U.S. (15 How.) 546, 559-560; *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447, 453-454. (Except in admiralty, forfeiture cases are triable to a jury. *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 153; 5 Moore's Federal Practice ¶ 38.12[7], subdivision 1 at p. 135.) *Cf. Decorative Stone Co.* v. *Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir. 1928), *cert. denied*, 277 U.S. 594. Furthermore, it appears that the few cases which have held that a court may decide if punitive damages shall be awarded have all been patent cases in which a jury trial was available on the issues of infringement and actual damages and the court merely decided, pursuant to unequivocal statutory language, whether the damages should be increased (up to a maximum of three times the actual damages). See *Seymour* v. *McCormick*, 57 U.S. 480, 488-489; *Swofford* v. *B. & W., Inc.*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962; *Kennedy* v. *Lasko Co.*, 414 F.2d 1249 (3rd Cir. 1969). Those cases indicate that the jury shall determine the issue of actual damages; the latter two cases find that *Beacon* and *Dairy Queen* compel a jury trial on the actual damage question. It is one thing to permit a judge to increase the damage award after a jury trial in which a statutory violation has been found and actual damages awarded (the trial judge's right to set the amount of a fine in a criminal case *after* a jury trial on the factual issues is somewhat analogous); it is quite another thing to permit the imposition of punishment when there is no jury trial as an element of the judicial process leading up to that result.

[45] See 42 U.S.C. § 1983.

right to a jury as a protection against the over-zealous judge, point the other way. Nor, if the right to have a jury represent a fair cross section of the community and the desirability of broadening lay participation in judicial implementation of civil rights are kept in mind, can one assert that policy considerations unequivocally favor one view rather than the other.

In the end, we look to another canon of construction as controlling in this case. As Mr. Justice Holmes stated in *United States* v. *Jin Fuey Moy*: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." 241 U.S. 394, 401. See also *United States* v. *Campos-Serrano*, 404 U.S. 293.[46]

Even if our discussion of the Seventh Amendment is deemed inadequate to overcome an unambiguous statutory denial of a jury trial in an action to recover compensatory and punitive damages, there are certainly enough "grave doubts upon that score" that we should place an interpretation on the statute which will avoid the constitutional issue. We therefore hold that it was error for the district court to refuse defendants' request for a jury trial.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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[46] And see *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 448-449:

"If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts, whether it would not be unconstitutional. No Court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution. . . ."

## Judgment of Court of Appeals

~~September 29, 1970~~
September 29, 1972

Before:

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and this cause be and the same is hereby REMANDED to the said District Court for further proceedings, in accordance with the opinion of this Court filed this day.